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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT, *Petitioner*,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

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SUBJECT INDEX

	Page
1. Petitioner's Position	1
2. Question Involved Solely One of Law	2
3. Commission Required to Comply with the Congressional Policy	3
4. Far-Reaching Importance of the Question Presented	6
5. Conclusion	8

TABLE OF AUTHORITIES CITED

Cases	Pages
Beaumont Port Commission v. Seatrain Lines, Inc., 2 U.S.M.C. 500 (1941), 2 U.S.M.C. 699 (1943)	7
Beaumont Port Commission v. Seatrain Lines, Inc., 3 F.M.B. 556 (1951)	7
City of Mobile v. Baltimore Insular Line, Inc., 2 U.S.M.C. 474 (1941)	7
City of Portland v. Pacific Westbound Conference, 4 F.M.B. 664 (1955)	3, 4, 5, 7
City of Portland v. Pacific Westbound Conference, 5 F.M.B. 118 (1956)	7
Encinal Terminals v. Pacific Westbound Conference, 5 F.M.B. 316 (1957)	5
Henderson v. United States, 339 U.S. 816 (1950)	6
Mitchell v. United States, 313 U.S. 80 (1941)	6
Pacific Far East Line v. United States, 246 F.(2d) 711 (C.A.D.C. 1957)	3, 4, 5
Proportional Commodity Rates on Cigarettes and Tobacco, 6 F.M.B. 48 (1960)	7
Stockton Port District v. Pacific Westbound Conference, 9 F.M.B. 12 (1965)	7

Statutes	
Merchant Marine Act, 1920: Section 8 (46 U.S.C. 867, 41 Stat. 992)	2, 3, 4, 5
Merchant Marine Act, 1936: Section 205 (46 U.S.C. 1115, 49 Stat. 1987)	4, 5

Pages

Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C.A. 1111 note) 4

Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C.A. 1111 note) 4
Section 103 (75 Stat. 840, 46 U.S.C.A. 1111 note) 4

Shipping Act, 1916:
Sections 15 and 16 (First) (46 U.S.C. 814, 815, 39 Stat. 733, 734, 75 Stat. 763) 5, 6

U. S. Code:
Title 33, Section 551 3

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Petitioner's Reply Brief

This brief is in reply to the various briefs which have been filed in opposition to petitioner's Petition for Writ of Certiorari herein.

1. Petitioner's Position

Some of the respondents have purported to state petitioner's position in this proceeding in a manner which requires petitioner to set forth its actual position herein.

Petitioner's position is not that the Port of Stockton has an exclusive right to any particular cargo, but that the Port of Stockton has the *right to compete* for any cargo without the added burden of an *artificial* barrier imposed by ocean carriers which deprives the Port of Stockton of this right to compete on a *natural* basis.

Stated in another way, the Port of Stockton is entitled to have all ports compete for cargo on the basis of their respective *natural* advantages and disadvantages, free from *artificial* devices, such as port equalization, which divert from Stockton to a competing port cargo which would otherwise move over Stockton. This is in accordance with the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867, 41 Stat. 992), and the other statutes cited in our Petition and implemented by the expenditure of federal funds for the development of ports.

2. Question Involved Solely One of Law

Some of the respondents assert that the question involved in this proceeding is one of fact or mixed fact and law, and within the exclusive discretion of the Federal Maritime Commission. This is incorrect.

The question which is actually involved here is *solely one of law*—namely, whether the federal statutes and the action of Congress to which we referred in our Petition establish a Congressional policy and intent that condemns, *as a matter of law,* the port equalization here involved and hence requires the Commission to hold such equalization unlawful, thus eliminating the Commission's discretion in this situation.

We are not asking this Court to substitute its discretion for that of the Commission, as certain of the respondents contend. We are asking the Court to determine the question of law that we have just stated, and to require the Commission to act in accordance with the law.

3. Commission Required to Comply with the Congressional Policy

The respondents contend that there is no expressed Congressional policy involved here, that any such policy is not binding on the Commission, and that the Congressional policy to which we refer is not applicable here because the Commission found that Stockton and San Francisco are in the same geographical area and that the area naturally tributary to Stockton is also naturally tributary to San Francisco.

With respect to whether there is any expressed Congressional policy, Section 551 of 33 U.S. Code (40 Stat. 1286) provides:

> "It is *declared to be the policy of the Congress** that water terminals are essential at all cities and towns located upon harbors or navigable waterways * * *"

Similarly with respect to Section 8 of the Merchant Marine Act, 1920 (46 U.S. Code 867, 41 Stat. 992), in the case of *Pacific Far East Line v. United States,* 246 F. (2d) 711 (C.A.D.C. 1957), the Court of Appeals declared:

> "* * * it is indicative of a *Congressional policy* favoring port improvement and development. * * *" (Page 716.)

Moreover, in the case of *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), the Board said of Section 8 of the Merchant Marine Act, 1920:

> "Section 8 *charges the Board with the duty* to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports." (Page 679.)

This shows very definitely that there is a Congressional policy of port development and, to that end, of the use by

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*All emphasis in quotations is supplied.

vessels of ports for freight which would *naturally* pass through them. The same policy is evidenced by Section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1115, 49 Stat. 1987), and by the expenditure by Congress of federal funds for the development of ports—to all of which we referred on pages 7 to 13 of our Petition herein.

But our opponents contend that this policy is not binding on the Commission because the functions specified in Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936, were not specifically transferred to the Commission under Section 103 of Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C.A. 1111 note), and in any event the Commission could consider the policy and then in its discretion render a decision contrary to the policy.

Sections 8 and 205, however, remained part of the law of the land, and the policy expressed therein continued to be the policy of Congress. The Commission cannot properly take action—as it has done in this case—directly contrary to the Congressional policy expressed therein, regardless of whether the investigatory functions thereunder are in another arm of the Federal Government. Moreover, the regulatory powers granted to the Federal Maritime Board by Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C.A. 1111 note) were exactly the same as those granted to the Commission by Reorganization Plan No. 7 of 1961, and in *City of Portland v. Pacific Westbound Conference*, supra, the Federal Maritime Board relied on the policy expressed in Section 8 of the Merchant Marine Act, 1920, in deciding that port equalization there involved was unlawful. This was affirmed by the Court of Appeals in *Pacific Far East Line v. United States*, supra. Likewise the Board relied on Section 205 of the Merchant Marine Act, 1936, in

the case of *Encinal Terminals v. Pacific Westbound Conference*, 5 F.M.B. 316 (1957). Sections 8 and 205 are just as applicable to the Commission as they were to the Board, its immediate predecessor.

The Commission is a creature of Congress and this Congressional policy is therefore binding upon it. The Commission cannot properly pay lip service to the policy and then—as it has done here—decide exactly contrary to the policy. This was recognized by the Federal Maritime Board in *City of Portland v. Pacific Westbound Conference*, supra, where the Board stated in the quotation hereinabove set forth that Section 8 of the Merchant Marine Act, 1920, *"charges the Board with the duty"* to comply with such Congressional policy. Similarly, the Court of Appeals suggested the same duty of the regulatory agency under Section 8 in *Pacific Far East Line v. United States*, supra, as follows:

> "* * * That policy having been expressed, the Board could, *if it was not bound to do so*, examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices *accordingly*. * * *" (246 F. (2d) 716.)

By these statutes and the expenditure of federal funds Congress has established the policy that the development of ports and the use of ports by vessels for the handling of cargo that would *naturally* move through them is in the public interest. The Commission should have so found here, and should have held that the diversion of cargo from the Port of Stockton by port equalization is contrary to the public interest and results in unjust discrimination and undue prejudice against the Port of Stockton, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916 (46 U.S.C. 814, 815, 39 Stat. 733, 734, 75 Stat. 763). The Commission's decision and order herein should be set aside and

the case should be remanded to the Commission with instructions to amend the order to comply with such Congressional policy and to hold the port equalization unlawful in violation of such provisions of the Shipping Act, 1916. (Compare *Mitchell v. United States,* 313 U.S. 80 (1941); *Henderson v. United States,* 339 U.S. 816 (1950).)

There is nothing in the Congressional policy here involved which makes it inapplicable if the ports in question are in the same geographical area or if the area naturally tributary to one port is also naturally tributary to another port. Congress has specified that, regardless of the location of the ports, a port should be used by vessels for "freight which would naturally pass through" such port. Here the Commission found that without port equalization much of the equalized cargo would move through the Port of Stockton. (Com. Rep. 7-8, R. 1272-73, Appendix of Petition Page 19.) Consequently the Congressional policy is applicable and should have been followed by the Commission by declaring the port equalization unlawful.

4. Far-Reaching Importance of the Question Presented

The respondents contend that the Commission's decision in question has only local significance and does not involve any ports other than Stockton and ports located on San Francisco Bay. This is incorrect.

Even if the Commission's decision were said to apply only to ports which are located in the same geographical area, it would be applicable to ports located throughout the United States. For example, Portland, Oregon, and other ports on the Columbia River and Seattle, Washington, and other ports on Puget Sound could all be held by the Commission to be in the same geographical area, and consequently this decision would be applicable to port equalization between

such ports. The same would be true with respect to the different ports in Southern California, such as Los Angeles, Long Beach, San Diego and Port Hueneme. Similarly, various ports on and adjacent to the Gulf of Mexico could be held to be in the same geographical area. The same conclusion could be reached with respect to different ports on the Great Lakes, and also different ports located along various portions of the Atlantic Coast. The Commission's decision here involved would clearly be applicable to all of these respective groups of ports located throughout the United States.

But, even further, the Commission's decision here is actually applicable to every port in the United States, since the Congressional policy to which we have referred, and which the Commission should have followed in this case, prevents port equalization in every instance where the cargo in question otherwise would have moved over the port equalized against. The Commission and its predecessors have had occasion to consider the question of the lawfulness of port equalization involving the ports of New York, Baltimore, various South Atlantic ports, Mobile, New Orleans, Lake Charles, Houston, Galveston, Texas City, Beaumont and other Gulf ports, Los Angeles, Long Beach, Stockton, San Francisco and other ports on San Francisco Bay, Portland, Seattle and other ports in the Pacific Northwest in the following cases: *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), 2 U.S.M.C. 699 (1943); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), 5 F.M.B. 118 (1956), *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960); *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965). It is thus apparent

that the question of the lawfulness of port equalization is of nation-wide concern.

In the cases cited immediately hereinabove the Commission and its predecessors reached varying results on the question of the lawfulness of port equalization. In some instances the port equalization was held to be unlawful, and in other instances lawful. The Congressional policy to which we have referred was applied in some instances and in other instances it was not.

The question of whether the Congressional policy prevents port equalization as a matter of law thus affects every port in the United States, and is of far-reaching importance. The Supreme Court should decide this question so that the Commission's decisions involving port equalization will not vacillate in the future as they have in the past.

5. Conclusion

The Supreme Court has never considered the lawfulness of port equalization by ocean carriers, and particularly the legal effect of the Congressional policy here under consideration on such port equalization. This question should be considered by the Supreme Court. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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